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IN THE

Supreme Court of the United States

AZEL P. SMITH, ET AL.,
Petitioners
v.
CITY OF JACKSON, MISSISSIPPI, ET AL.,
Respondents

On Writ Of Certiorari To The United States Court Of Appeals For the Fifth Circuit

BRIEF AMICUS CURIAE OF THE CORNELL UNIVERSITY CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND THE NATIONAL LAWYERS GUILD IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

The Cornell University chapter of the American Association of University Professors seeks to advance academic freedom, to define fundamental professional values and standards for higher education, and to ensure higher education's contribution to the common good. The chapter is particularly concerned with issues of age discrimination; most members of the chapter are over age 40. Membership is open to all faculty, librarians, and academic professionals employed by Cornell University. Librarians and academic professionals do not enjoy tenure, and increasing numbers of teaching and research positions are being taken off the tenure track. All persons in these positions can be discharged at will and are subject to the discriminatory effects of non-job-related criteria. Even tenured professors are not fully protected from Disparate Impact discrimination.

The National Lawyers Guild was founded in 1937 as the first integrated national organization of lawyers in the United States. Based on the premise that the law should be used for social amelioration, the Guild currently consists of approximately 6,000 lawyers, legal workers and law students. Individually and on specific shared projects, members work nationally on a wide range of legal concerns. Labor and employment issues have been a central focus of the Guild's mission during its nearly seventy-year history, and its Labor and Employment Committee monitors working conditions in this country and internationally.

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1. The parties' written consent to the filing of briefs amicus curiae has been filed with the Clerk of this Court. Amici state that this brief was not authored in whole or in part by counsel for any party and that no party or entity, other than Amici and their counsel, has made any monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

I.A (pp. 4-7) . Disparate Treatment and Disparate Impact are not distinct claims, but instead are legal theories or methods of proving the single claim of discrimination. Justice Powell recognized the true nature of these theories in *Connecticut v. Teal* at 458-459 (1982) (Powell, J., dissenting),[2] and seven members of this Court joined Justice O'Connor in subscribing to Justice Powell's theorem in *Watson v. Fort Worth Bank & Trust* at 985-987 (1988).

I.B (pp. 7-18). The claim of discrimination comprises five elements or material facts. Disparate Treatment and Disparate Impact are methods of proving these material facts. As methods of proof, Disparate Treatment and Disparate Impact differ chiefly in their evidence of causation. Both methods prove the material fact that a protected characteristic was a cause of the employer's denial of an employment opportunity to the plaintiff; Disparate Treatment proves causation with evidence of intent (the employer intentionally disadvantaged the plaintiff because of a protected characteristic), whereas Disparate Impact proves causation with evidence of effect (an employment practice was "functionally equivalent to intentional discrimination," *Watson* at 987, because the practice had an adverse effect on the plaintiffs' class and was not job related). The defenses in Disparate Treatment and Disparate Impact – respectively, the bona fide occupational qualification and job relatedness – attack the same material fact, namely, the plaintiff's qualifications. Thus, Disparate Treatment and Disparate Impact are methods of proving or

2. Complete citations to the cases, statutes, and other authorities cited in this brief appear in the Table of Authorities.

disproving the material facts of the single claim of discrimination.

I.C (pp. 18-20). Disparate Treatment and Disparate Impact are one scheme for classifying the methods of proving discrimination. An alternative scheme is equally descriptive of these methods; the alternative focuses on whether the evidence is conventional or statistical instead of whether causation is proved with evidence of intent or effect. That the methods of proving the claim of discrimination may be classified in different ways emphasizes that Disparate Treatment and Disparate Impact are not themselves claims, but instead are methods of proving the claim of discrimination.

I.D (pp. 20-21). Justice Powell's theorem is no longer true of Title VII of the Civil Rights Act of 1964 because the Civil Rights Act of 1991 amended Title VII to provide for different relief for Disparate Treatment (intentional discrimination) and Disparate Impact. The 1991 act, however, did not amend the Age Discrimination in Employment Act in any pertinent way, and Justice Powell's theorem remains true of the Age Act.

I.E (pp. 21). Congress was unaware of Disparate Impact in 1967, but this fact is not important because recognizing methods of proving a claim is the province of the judiciary. The question, therefore, is whether Disparate Impact proves discrimination, and the answer to this question has been yes since *Griggs v. Duke Power Company* (1971).

I.F (p. 22). The Age Act outlaws age discrimination in employment. This Court has held that both Disparate Treatment and Disparate Impact prove discrimination. It follows that this Court should approve Disparate Impact as a method of proving age discrimination in employment.

II (pp. 22-23). The purpose of the Age Act is to promote employment of workers on the basis of ability instead of age. Employment practices with a Disparate Impact do just the opposite: they select on the basis of age, not ability. Thus, practices with a Disparate Impact fall squarely within the evil which the Age Act was intended to eradicate.

ARGUMENT

I

DISPARATE TREATMENT AND DISPARATE IMPACT ARE NOT DISTINCT CLAIMS, BUT LEGAL THEORIES OR METHODS OF PROVING THE CLAIM OF DISCRIMINATION. THAT CONGRESS WAS UNAWARE OF DISPARATE IMPACT WHEN THE AGE ACT WAS PASSED IN 1967 IS, THEREFORE, UNIMPORTANT. DISPARATE IMPACT PROVES DISCRIMINATION, AND THIS COURT SHOULD APPROVE IT.

A

Justice Powell's theorem holds that Disparate Treatment and Disparate Impact are legal theories or methods of proving the claim of discrimination. This Court has subscribed to Justice Powell's theorem .

Disparate Treatment and Disparate Impact are normally thought to be distinct claims; however, under the Age Discrimination in Employment Act of 1967 (Age Act) – as well as under Title VII of the Civil Rights Act of 1964 prior to amendment by the Civil Rights Act of 1991 – *Disparate Treatment and Disparate Impact are not claims, but legal theories or methods of proving the claim of discrimination.* Justice Powell recognized the true nature of these theories twenty years ago. He stated the following theorem:

> [W]hile disparate-treatment cases focus on the way in which an individual has been treated, disparate-impact cases are concerned with the protected group.... The Court, disregarding the distinction drawn by our cases, repeatedly asserts that Title VII was designed to protect individual, not group, rights.... But this argument confuses the *aim* of Title VII with the **legal theories** through which its aims were intended to be vindicated. It is true that the aim of Title VII is to protect individuals, not groups. But in advancing this commendable objective, Title VII jurisprudence has recognized two distinct **methods of proof**. In one set of cases – those involving direct proof of discriminatory intent – the plaintiff seeks to establish direct, intentional discrimination against him.... In disparate-impact cases, by contrast, the plaintiff seeks to carry his burden of proof by way of *inference* – by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs. From such a showing a fair inference then may be drawn that the rejected applicant, as a member of that disproportionately excluded group, was himself a victim of that process' "built-in headwinds."

Connecticut v. Teal at 458-459 (Powell, J., dissenting; citation omitted; italics in original; boldface added).

Justice Powell's theorem appeared in a dissent joined by Chief Justice Burger and Justices Rehnquist and O'Connor; the majority of the Court did not comment on the theorem. A few years later, however, this Court subscribed to the theorem. In a section of her opinion joined by Chief Justice Rehnquist and Justices Brennan, White, Marshall, Blackmun, Stevens, and Scalia (Justice Kennedy not participating), Justice O'Connor

repeated the theorem that Disparate Treatment and Disparate Impact are not distinct claims, but rather legal theories or methods of proving the claim of discrimination. Justice O'Connor wrote:

> Several of our decisions have dealt with the **evidentiary standards** that apply when an individual alleges that an employer has treated that particular person less favorably than others because of the plaintiff's race, color, religion, sex, or national origin. In such "disparate treatment" cases ... the plaintiff is required to prove that the defendant had a discriminatory intent or motive. In *Griggs v. Duke Power Co.*, this Court held that a plaintiff need not necessarily prove intentional discrimination in order to establish that an employer has violated § 703 [of Title VII].... The factual issues and the character of the evidence are inevitably somewhat different when the plaintiff is exempted from the need to prove intentional discrimination. The evidence in these "disparate impact" cases usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities. **The distinguishing features of the factual issues that typically dominate disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used.**

Watson v. Fort Worth Bank & Trust at 985-987 (1988) (citations omitted; boldface added). *See also Washington v. Davis* at 253-254 (1976) (Stevens, J., concurring), in which Justice Stevens may have anticipated the theorem ("the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume").

B

A single claim of discrimination exists. Disparate Treatment and Disparate Impact are methods of proving this claim. They are similar except for how they prove causation.

Under Justice Powell's theorem, one claim of discrimination exists. It follows that a single set of facts constitutes the elements or "prima facie case in the first sense" of discrimination. Disparate Treatment and Disparate Impact are "prima facie cases in the second sense," that is, legal theories or methods of proving the claim of discrimination. They are similar except in the ways they prove the element of causation.

1

The term "prima facie case" has two meanings: the elements of a claim and the evidence that proves the elements of a claim.

The term "prima facie case" is used in two senses. It can mean the *elements* or the *material facts* of a claim; for example, the elements of battery are (1) the defendant (2) intentionally (3) inflicted a physical contact (4) on the plaintiff, and the contact was (5) harmful or offensive. Prosser, *Handbook of the Law of Torts* § 9. This may be called the prima facie case in the first sense. "Prima facie case" can also mean the *evidentiary facts that prove* the elements of a claim; for example, a prima facie case of battery may be proved by the plaintiff's testimony that he was punched in the nose by the defendant, who had just said, "I am going to punch you." This may be called the prima facie case in the second sense. Similar prima facie cases in the second sense may be grouped together and called a legal theory or method of proof.

Only one prima facie case in the first sense, or set of material facts, exists for each claim; these facts *constitute* the claim. In contrast, numerous prima facie cases in the second sense may exist for a claim. A claim may be *proved* by various theories or methods of proof.

2

The claim of discrimination has five elements.

The prima facie case in the first sense of discrimination – the elements of the claim – consists of these material facts:

1) The employer (or union or employment agency) was covered by the act.

2) The employer offered an employment opportunity.

3) The plaintiff was protected by the act, that is, the plaintiff was qualified for, and willing to accept, the opportunity.

4) The employer denied or afforded the plaintiff a lesser chance to benefit from the opportunity.

5) A protected characteristic of the plaintiff (race, sex, etc. or age) was a cause of the employer's act.

See Gold, *Disparate Impact Under the Age Discrimination in Employment Act of 1967* (2004) at 10-26.

3

Disparate Treatment and Disparate Impact are prima facie cases in the second sense. They prove the elements of the claim of discrimination. They differ chiefly in the ways they prove the element of causation.

Justice Powell's theorem holds that Disparate Treatment and Disparate Impact are legal theories or methods of proof; thus, they are prima facie cases in the second sense. Being methods of proof, they establish the material facts or elements of the claim of discrimination. Therefore, the difference between Disparate Treatment and Disparate Impact lies in the way in which they prove the elements of the claim. They differ chiefly in how they prove causation.

Disparate Treatment comes in two varieties. In one, the evidence is entirely conventional; let us call this variety "Conventional Disparate Treatment." In the other variety, the evidence is conventional and statistical; let us call this variety "Statistical Disparate Treatment." Disparate Impact also comes in varieties; the one that dominates the cases, and is the focus of the following discussion, uses conventional and statistical evidence.

This Court has held that the two varieties of Disparate Treatment as well as Disparate Impact prove the elements of the claim of discrimination.

CONVENTIONAL DISPARATE TREATMENT: *Trans World Airlines v. Thurston* (1985) illustrates the way that exclusively conventional evidence can prove discrimination. An airline allowed flight captains under the age of 60 to transfer to the job of flight engineer, but did not allow captains over age 60 to transfer.[3] *Thurston* at 114-116.

STATISTICAL DISPARATE TREATMENT: *International Brotherhood of Teamsters v. United States* (1977) illustrates one way that conventional and statistical evidence can combine to prove discrimination. A trucking firm employed almost no persons of color in the job of line driver in cities in which people of color constituted large fractions of the population.[4] *Int'l B'd Teamsters* at 337 and n. 17.

DISPARATE IMPACT: *Dothard v. Rawlinson* (1977) illustrates another way that conventional and statistical evidence can combine to prove the elements of discrimination. The State of Alabama required prison guards to stand a minimum of 5 feet 2 inches tall and weigh a minimum of 120 pounds. These minima were satisfied by 99 percent of men but only 51 percent of women, and the state failed to prove the minima were connected to successful performance of the job. *Dothard* at 323-324, 329-332.

Let us now examine in detail how these three methods of proof establish the elements of the claim of discrimination.

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3. This statement of the facts of *Thurston* is slightly simplified.

4. Only one aspect of the *Teamsters* case is discussed herein.

THE FIRST ELEMENT:
The employer was covered by the act.

CONVENTIONAL DISPARATE TREATMENT: Coverage is proved with conventional evidence of the size of the employer's work force in the current or preceding year. Coverage was not contested in *Thurston*.

STATISTICAL DISPARATE TREATMENT: Same as above. Coverage was not contested in *Teamsters*.

DISPARATE IMPACT: Same as above. Coverage was not contested in *Dothard*.

THE SECOND ELEMENT:
The employer offered an employment opportunity.

CONVENTIONAL DISPARATE TREATMENT: The existence of an employment opportunity is proved with conventional evidence, for example, that the employer was hiring workers. In *Thurston* the airline allowed some captains to transfer to the job of flight engineer.

STATISTICAL DISPARATE TREATMENT: Same as above. In *Teamsters* the firm was hiring line drivers.

DISPARATE IMPACT: Same as above. In *Dothard* the state was hiring prison guards.

THE THIRD ELEMENT:

The plaintiff was protected by the act, that is, the plaintiff was qualified for, and willing to accept, the opportunity.

CONVENTIONAL DISPARATE TREATMENT: Protection by the act is proved with conventional evidence of the plaintiff's interest in and qualifications for the opportunity. In *Thurston* captains were qualified to train for the duties of flight engineer and desired to transfer because of a federal regulation that prohibited them from continuing to serve as captains.

STATISTICAL DISPARATE TREATMENT: The plaintiffs' interest and qualifications are proved in Statistical Disparate Treatment with statistics concerning the "qualified labor pool." This is the group of workers who are willing and able to benefit from the opportunity in question (usually, a job). In most cases, evidence of the qualified labor pool is practically impossible to obtain, and so a proxy is used to represent it. If a proxy is fair, what is true of the proxy is true of the qualified labor pool, and it follows that facts proved about the persons in a fair proxy are true of the workers who are qualified for and interested in the opportunity. In *Teamsters* the proxy was the population surrounding the trucking terminals; the population was a fair proxy because there was no evidence that proportionally more whites than people of color were interested in or qualified for the job of line driver.

DISPARATE IMPACT: Same as Statistical Disparate Treatment. In *Dothard* the proxy was the population of the nation; the population was a fair proxy because there was no evidence that the height and weight characteristics of the national population differed from the characteristics of the qualified labor pool for the job of prison guard.

THE FOURTH ELEMENT:

The employer denied or afforded the plaintiff a lesser chance to benefit from the opportunity.

CONVENTIONAL DISPARATE TREATMENT: Denial of opportunity is proved with conventional evidence of how the employer treated the plaintiff. In *Thurston* the airline refused to allow captains over age 60 to transfer to flight engineer.

STATISTICAL DISPARATE TREATMENT: Denial of opportunity is proved in Statistical Disparate Treatment with statistical evidence that the employer disparately awarded opportunities to the plaintiffs and their comparators in the qualified labor pool. A disparity may be established by comparing the plaintiffs' share of the proxy directly with their share of the opportunity, or by comparing the success rates of the plaintiffs and their comparators in obtaining the opportunity. The former comparison was used in *Teamsters*. People of color were 10 to 50 percent of the populations surrounding the trucking firm's terminals and, therefore, were 10 to 50 percent of the qualified labor pool for the job of line driver; but people of color held almost none of the line driving jobs.

DISPARATE IMPACT: Same as Statistical Disparate Treatment with a linguistic exception: in Disparate Impact a disparity is called an "adverse effect."[5] The height and weight minima in *Dothard* had an adverse effect because they were satisfied by 99 percent of men but only 51 percent of women.

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5. The term "adverse effect" refers to a disparity created by an employment practice. The term "Disparate Impact" refers to an employment practice that has an adverse effect and is not job related.

THE FIFTH ELEMENT:
A protected characteristic of the plaintiff was a cause of the employer's act.

CONVENTIONAL DISPARATE TREATMENT: Causation is proved with conventional evidence of intent: the employer disadvantaged the plaintiff on account of a protected characteristic. In *Thurston* the airline intentionally disadvantaged the plaintiffs by allowing captains under age 60, but not those over age 60, to transfer to flight engineer.

STATISTICAL DISPARATE TREATMENT: Same as Conventional Disparate Treatment. In *Teamsters* the employer purposefully gave false information to applicants of color and ignored their applications. *Int'l B'd Teamsters* at 338.

DISPARATE IMPACT: Causation is proved in Disparate Impact by effects. The proof rests on two findings: (1) the adverse effect resulted from a specific employment practice (2) which was not job related or a business necessity. In *Dothard* the adverse effect resulted from the height and weight minima, which did not correlate with successful performance of the job.

The theory of causation in the Disparate Impact method of proof requires a word of explanation. As just noted, two facts establish causation: an employment practice has an adverse effect on the plaintiffs' class, and the practice is not job related or a business necessity. A practice that is not job related serves no legitimate interest of the business. Such a practice is legally harmless as long as it affects protected classes equally; an employer who refuses to hire Virgos does not discriminate against blacks or whites, men or women, older or younger workers. But a practice that is not job related *and* systematically favors one class over another is "in operation ... functionally

equivalent to intentional discrimination." *Watson* at 987. The reason can be understood by asking the question, what does such a practice do? The answer is that **a practice with a Disparate Impact does one thing and one thing only: it favors members of one class over another.** Thus, in *Dothard* the height and weight minima had an adverse effect on women. The minima served no legitimate interest of the employer because there was no evidence that larger persons made better prison guards than did smaller persons. But the minima were not inert. They did one thing: they favored men over women.

It is now evident that the Disparate Treatment and Disparate Impact methods of proof overlap substantially. The major difference between them is the way causation is established. Disparate Treatment establishes causation with proof of intent – the employer intentionally disadvantaged the plaintiffs; Disparate Impact establishes causation with proof of effect – an employment practice had an adverse effect on the plaintiffs and was not job related and, therefore, was "in operation ... functionally equivalent to intentional discrimination," *Watson* at 987. Under both theories, the evidence proves the same material fact, namely, that a protected characteristic of the plaintiffs was a cause of their losing an employment opportunity.

This analysis demonstrates that Disparate Impact and Disparate Treatment are not separate claims. Instead, they are prima facie cases in the second sense – legal theories or methods of proving the single claim of discrimination. Examination of the defenses under these methods of proof leads to the same conclusion.

4

The defenses to Disparate Treatment and Disparate Impact both attack the same element of the claim of discrimination, namely, the plaintiff's qualifications, and therefore confirm that Disparate Treatment and Disparate Impact are not separate claims.

The evidence in the Disparate Treatment and Disparate Impact methods of proof is directed at single set of material facts. The same is true of the substantive defenses. Each of these defenses attacks the same material fact, namely, the plaintiff's qualifications for the opportunity.

The defense in the Disparate Treatment method of proof is the bona fide occupational qualification (BFOQ). An employer may award employment opportunities on the basis of age, religion, sex, or national origin if the characteristic is "reasonably necessary to the normal operation of that particular business." Age Act, § 4(f)(1); Title VII, § 703(e). A characteristic is a BFOQ if all or substantially all members of the class who lack the characteristic are unable to perform an essential task of the job and individual testing is not feasible. *See* Lindemann & Grossman, *Employment Discrimination Law* at 395 and ff. So far we have discussed the Disparate Impact issue in *Dothard,* but now we turn to the BFOQ issue in the case; and on the latter issue this Court held that being male was a BFOQ for the job of guard in the maximum-security prisons of Alabama because of the risk that a woman would be sexually assaulted. *Dothard* at 332 and ff.

Procedurally, a BFOQ is an affirmative defense because the burden of persuasion rests on the defendant. *Dothard.* at 334; *International Union, United Automobile Workers v. Johnson Controls* at 206 (1991). Substantively, a BFOQ destroys an

element of the plaintiff's prima facie case. Being qualified for the opportunity is an element of the claim of discrimination. If all persons of the plaintiff's age, religion, sex, or national origin are unable to perform an essential task of the job, the plaintiff is simply not qualified for the job. No woman was qualified to be a guard in the maximum-security prisons of Alabama because every woman faced the risk of sexual assault.

The defense in the Disparate Impact method of proof is that the employer's practice is job related or a business necessity. After the plaintiff proves that an employment practice had an adverse effect, the employer may defend (in an employee selection case such as the one at bar) by proving that the practice distinguished between qualified and unqualified workers. *See* Lindemann & Grossman, *Employment Discrimination Law* at 106 and ff. For example, suppose the height and weight minima in *Dothard* had been job related, that is, that larger persons had in fact made better prison guards than smaller persons did. In this event, the minima would have distinguished between qualified and unqualified workers. Proportionally fewer women than men would have been qualified for the job, but an employer is entitled to select qualified workers.

Thus, when an employer proves that its selection criterion is job related, the employer demonstrates that its practice selects qualified workers – and that workers who are not selected are not qualified. If the height and weight minima had been job related in *Dothard*, workers smaller than 5 feet 2 inches and 120 pounds would have not been qualified for the job.

If a characteristic is a BFOQ for a job, a worker who lacks the characteristic is not qualified for the job. If a selection criterion is job related, a worker who fails the criterion is not qualified

for the job. It follows that the defenses in Disparate Treatment and Disparate Impact attack the plaintiff's evidence of the identical material fact, namely, qualifications, and this identity reinforces Justice Powell's theorem that Disparate Treatment and Disparate Impact are not distinct claims, but methods of proving the same claim.

For a more complete discussion of how each step in Disparate Treatment and Disparate Impact proves the elements of the claim of discrimination and the defenses, *see* Gold, *Towards a Unified Theory of the Law of Employment Discrimination* (2001).

C

Disparate Treatment and Disparate Impact constitute a scheme for classifying the methods of proving discrimination. The existence of an alternative classification scheme confirms Justice Powell's theorem.

Disparate Treatment and Disparate Impact together constitute a scheme for classifying the methods of proving discrimination. Another classification scheme is equally descriptive of the methods of proving discrimination, and this fact confirms Justice Powell's theorem.

Disparate Treatment and Disparate Impact classify the proof of discrimination according to how causation is established. The former proves causation with evidence of intent (an employer intentionally denied opportunities to a protected class), and the latter proves causation with evidence of effects (an employment practice had an adverse effect on a protected class and was not job related).

As we described Disparate Treatment, we found it necessary to mention that it came in two varieties: one relied exclusively on conventional evidence, and the other used both conventional and statistical evidence. We also pointed out that Statistical Disparate Treatment has much in common with – indeed, except for the proof of causation, is indistinguishable from – Disparate Impact. Therefore, an alternative to the Disparate Treatment/Disparate Impact classification scheme exists; the alternative focuses, not on how causation is proved, but on whether conventional or statistical evidence is used.

Under the alternative classification scheme, the theories or methods of proving discrimination are named "Conventional Proof" and "Statistical Proof." Conventional Proof is the same as the theory which we have previously called "Conventional Disparate Treatment." The evidence in cases described by Conventional Proof comprises only testimony and documents, for example *Thurston*, in which the airline would not allow captains over the age of 60 to transfer to the job of flight engineer.

The theory named "Statistical Proof" is the same as the theories we have previously called "Statistical Disparate Treatment" and "Disparate Impact." Statistical Proof uses statistical evidence – a proxy for the qualified labor pool, and a statistically significant disparity between the success rates of the plaintiffs and the comparators – to prove that the plaintiffs were qualified for and interested in the job, and that the employer denied or afforded the plaintiffs a lesser chance to benefit from the opportunity. Two varieties of Statistical Proof exist, one which proves causation with evidence of intent and another which proves causation with evidence of an adverse effect and the absence of job relatedness.

Our purpose is not to argue that this alternative classification scheme is superior to Disparate Treatment/Disparate Impact (though the alternative has the advantage of focusing attention on the nature of the evidence offered rather than on the inferences drawn from the evidence). Instead, our purpose is to emphasize the point that Disparate Treatment and Disparate Impact are not distinct claims, but a scheme for classifying the methods of proving the claim of discrimination. By whichever scheme the methods of proof are classified, the claim itself is not affected. Whole numbers can be classified as odd or even, prime or non-prime, perfect squares or not, but their fundamental character as whole numbers is not changed.

Nonetheless, the alternative classification scheme illuminates the issue in the case at bar. If Justice Stewart had classified the theories of proving discrimination as Conventional Proof and Statistical Proof instead of as Disparate Treatment and Disparate Impact, *see Int'l B'd Teamsters* at 335 n. 15, the issue in the case at bar would have been trivial: for no reasonable person would argue that Congress intended to disallow statistical evidence as proof of discrimination.

D

Although no longer true of Title VII because of the 1991 amendments, Justice Powell's theorem remains true of the Age Act.

Justice Powell's theorem is no longer true of Title VII, but the theorem remains true of the Age Act. Section 102 of the Civil Rights Act of 1991 provided compensatory and punitive damages for Disparate Treatment (intentional discrimination) but not for Disparate Impact. Therefore, under Title VII the intent to discriminate is no longer merely a way of proving causation; intent is now a material fact in the claim of Disparate

Treatment. Because the material facts of, and the relief for, Disparate Treatment and Disparate Impact now differ under Title VII, they are distinct claims under that statute. The Age Act, however, was not amended as Title VII was. In the pertinent regards, the Age Act is the same as Title VII was before 1991. It follows that Justice Powell's theorem remains true of the Age Act.

E

Courts traditionally recognize methods of proving claims that have been created by legislatures, and therefore it does not matter that Congress was unaware of Disparate Impact when the Age Act was passed. What does matter is that Disparate Impact proves discrimination.

When it passed the Age Act in 1967, Congress was not aware that discrimination could be proved by the Disparate Impact theory. *See* Gold, *Disparate Impact under the Age Discrimination in Employment Act of 1967* at 38-54. This fact would be crucial if the issue in the case at bar were whether to recognize a new claim under the act; a court should rarely if ever expand a statute to embrace a claim not envisioned by the legislature. The issue in the case at bar, however, is not whether to recognize a new claim; the issue is whether to recognize another method of proving an existing claim. For this reason, it does not matter that Congress was unaware of Disparate Impact. Recognizing methods of proving claims lies within the province of the judiciary. What matters, accordingly, is whether Disparate Impact does indeed prove discrimination – a question which this Court has answered in the affirmative since *Griggs v. Duke Power Company* (1971).

F

Disparate impact should be approved as a method of proving discrimination under the Age Act.

The Age Act outlaws age discrimination in employment. This Court has held that both Disparate Treatment and Disparate Impact prove discrimination. It follows that this Court should approve Disparate Impact as a method of proving age discrimination in employment.

II

EMPLOYMENT PRACTICES WITH A DISPARATE IMPACT ARE THE SORT OF EVIL THAT CONGRESS MEANT TO ERADICATE.

Liberty should not be restricted without good reason. Conduct that falls "within the letter of the statute and yet ... not within its spirit" should not be illegal. *Holy Trinity Church v. United States* at 459 (1892). We have established that Disparate Impact proves discrimination and, therefore, falls within the letter of the statute. Would eliminating practices with a Disparate Impact also serve the purposes of the statute? The answer is yes.

Practices that have a Disparate Impact on older workers fall within the evil at which the Age Act was aimed. That Disparate Treatment and Disparate Impact are indistinguishable except for the way causation is proved stands as strong evidence that both address the same evil. If one serves the purposes of the Age Act, so does the other. Examination of the purposes stated in the act leads to the same conclusion.

Congress stated its purposes plainly. One of them was

> ...to prohibit arbitrary age discrimination in employment....

Age Act, § 2(b). An employment practice that is not job related is arbitrary because it serves no legitimate need of the business. If an employment practice is not only arbitrary, but also discriminatory – if it favors younger workers over older workers, all of whom are willing and able to perform the work in question – the practice is an evil of the sort that Congress meant to eradicate.

Another purpose of the Age Act was

> ... to promote employment of older persons based on their ability rather than age ....

Id. A practice with a Disparate Impact on older workers **has one and only one effect:** it selects on the basis of age. This is directly contrary to the purpose of the act.

Recognizing Disparate Impact as a method of proving discrimination under the Age Act would serve the purposes of the act. It would ensure that older workers are indeed judged "based on their ability rather than age." *Id.*

CONCLUSION

Employment discrimination is like Janus: a creature with two faces but one body. The body is the single claim of discrimination that is recognized by the Age Act. The faces are Disparate Treatment and Disparate Impact, which are methods of proving the claim. As methods of proof, they establish the

same material facts. They both prove discrimination. It is unimportant that Congress was not aware of the Disparate Impact method of proof in 1967, for recognizing methods of proof is a function of the judiciary. This Court has held that Disparate Impact proves discrimination. An employment practice that has a Disparate Impact is not job related; it serves no legitimate interest of the business. The practice does only one thing: it selects on the basis of age, not ability. A practice with a Disparate Impact, therefore, incarnates the evil at which Congress directed the Age Act. For these reasons, Amici respectfully request that this Court reverse the judgment of the Court of Appeals for the Fifth Circuit and remand the case for further proceedings.

Respectfully submitted,

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